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WITHDRAWAL OF THE UNITED STATES OF AMERICA

Options for the collection of unpaid assessed contributions from the United States Government

Report by the Director-General

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Introduction

1. On 31 December 1996 the Government of the United States of America ended its membership in UNIDO, at which time it owed the Organization a sum of $61.3 million in arrears. The Board, in its decision IDB.17/Dec.3, requested the Director-General, in the context of proposed United States legislation prohibiting the payment of arrears to UNIDO, to "explore all possibilities for the collection of the arrears ...". Some political and legal options which Member States may wish to consider for the collection of unpaid assessed contributions from the United States Government are outlined in the present report.

I. POLITICAL OPTIONS

A. Contact Group of Member States

2. A Contact Group of Member States could be established by the Board and/or the General Conference and tasked with engaging the United States Government in discussions and negotiations aimed at settling the outstanding arrears. This initiative could either operate on its own or together with other options which might be retained by the Board among those set out below.

3. In discussing the specific issue of arrears, the Contact Group could appeal to the executive branch of the United States Government to prevail upon Congress to change the existing policy by removing the prohibition of payments to UNIDO from the 1997 United Nations Reform Act currently under consideration by Congress. The basic mandate of the Contact Group would be to try to obtain the payment in full of the arrears owed by the United States. However, within the framework of its negotiations, the Contact Group could also be authorized to propose to the United States Government options for debt settlement as outlined below, or to discuss the legal option of submitting the whole matter to an arbitral tribunal.

B. Enlisting the support of non-governmental organizations and industry groups

4. UNIDO could enlist the support of influential non-governmental organizations (NGOs) and industry groups to try to change the current legislative and policy environment in the United States towards UNIDO in general. The UNIDO Secretariat has already undertaken some contacts in that respect, which could be further strengthened through the Contact Group of Member States.

5. An important NGO with which the UNIDO Secretariat has often worked in the past is the United Nations Association of America (UNA). The Chairman of UNA, and the Co-Chair of its National Council, recently sent a letter to the President of the United States concerning the United Nations Reform Act pending in the United States Congress in which they stated: "Another troublesome feature of this legislation is its renunciation of a well documented debt to UNIDO." The Association could also be helpful to UNIDO in appealing to members of Congress.

6. Moreover, UNIDO could appeal for support from industry groups with which the Secretariat has been in contact, such as the Licensing Executives Association, the American Manufacturers Association, Chambers of Commerce in the home states of UNIDO suppliers, and United States enterprises and industry associations which have benefited from UNIDO's services.

C. Purchase and procurement linkages

7. Member States could consider the possibility of excluding United States undertakings from UNIDO purchase and procurement contracts for purposes of applying political pressure aimed at inducing the United States Government to pay its arrears to UNIDO. A number of difficulties would, however, arise from the total exclusion of potential United States national bidders from UNIDO contracting procedures. Firstly, a fundamental principle of these procedures is that the Organization must obtain the best "value for money" when procuring goods and services. Thus, financial rule 109.21 (b) provides that "Contracts shall be awarded to those firms or institutions that have tendered the lowest, technically acceptable bid or submitted the lowest, technically acceptable proposal ...". Secondly, an exception to this rule—which excludes on the grounds of nationality certain otherwise financially and technically competitive undertakings— might penalize the recipients of UNIDO technical assistance by denying them the choice inherent in selecting the lowest, technically acceptable bid without necessarily influencing the attitude of the non-Member State. In principle, there is no legal impediment for the Board or the Conference to request the Director-General to introduce such an exclusion, but this would require the establishment of new evaluation elements (e.g. nationality) other than quality and price for the assessment of bids and proposals. This option would therefore need to be carefully weighed by the Member States in terms of its appropriateness as well as its effectiveness in producing the desired results.

C. Debt settlement option

8. Member States may also wish to consider a debt settlement option. This option would be based on a negotiated agreement with the United States Government to issue bonds with a future maturity date for the payment of

its arrears. A debt settlement option could be proposed by the Contact Group to the United States Government, and negotiated with United States authorities with the technical assistance of an experienced debt settlement expert.

9. The mechanics of such a settlement could be as follows: an agreement could, for example, be negotiated with the United States Government to pay its UNIDO obligations by issuing $60 million bonds with a stated interest rate negotiated by the parties. This option has the advantage of flexibility. UNIDO would have the choice of selling all the bonds upon issuance and receiving the current cash proceeds, or selling some of the bonds each year depending upon cash requirements. UNIDO could also hold the bonds to maturity and take the annual interest payments.

10. A debt settlement option has advantages for each party. UNIDO could succeed in obtaining the settlement of outstanding United States obligations in a delicate political environment. The Organization could also achieve flexibility in managing cash flow by selling bonds for current value at its own schedule and depending upon prevailing needs. The United States would settle an outstanding legal obligation to an international organization according to negotiated terms.

11. This option would imply a discount in the present value of the obligation. The obligations of Member States, in terms of assessed contributions to the Organization, are not legally susceptible to discount; however, the United States being a non-Member State, the General Conference could give an explicit mandate to the Contact Group of Member States to negotiate the best possible settlement package with the United Sates authorities.

II. LEGAL OPTIONS

12. The injury inflicted upon UNIDO by the non-payment of the United States arrears provides a valid basis for a legal claim. The activities, efficiency, credibility and reform efforts of the Organization have been damaged because of the non-payment of arrears. UNIDO Member States have also been injured as they have been required to make up the shortfalls created by the arrears, such as those arising from the 1995-1996 staff reduction. Moreover, the delivery of technical assistance to developing countries has been hampered by the United States non-payment of its dues, which has led to a chronic non-availability of adequate cash for the Organization's activities. The legal options set out below contemplate the possibility of advancing UNIDO's claims in three distinct forums: the International Court of Justice, an arbitral tribunal, and a United States federal court.

A. International Court of Justice

13. A first legal option could be to request the International Court of Justice for an advisory opinion. Although not a legally enforceable judgment, there are sound strategic reasons for requesting such an opinion. An International Court of Justice advisory opinion can help mobilize public sentiment, and can be invoked in subsequent claims in domestic forums or before an arbitral tribunal. It could equally be useful in connection with the political options described above. Furthermore, the advisory opinion could spell out the legal consequences of non-payment of arrears, and reinforce the principle that the failure to fulfil financial obligations towards an international institution should be regarded as a legal injury to other States entitling them to claim redress.

14. UNIDO is empowered to request an advisory opinion of the Court under its Constitution and pursuant to its United Nations relationship agreement. Article 22.2 of the UNIDO Constitution states:

> "The Conference and the Board are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Organization's activities."

This authorization has been granted to UNIDO through its relationship agreement with the United Nations (article 12 (b)).

15. According to Article 96, paragraph 2, of the United Nations Charter, three conditions must be satisfied in order to obtain the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized to request opinions from the Court (which is the case of UNIDO); the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency.

16. There is no doubt that the collection of unpaid assessed contributions from a former Member State is a matter within the scope of activities of UNIDO. Nevertheless, a clearly formulated legal question must be submitted to the Court.

17. In acceding to the UNIDO Constitution, States undertake clear legal obligations as to the financing of the Organization. Article 15.1 of the Constitution provides:

> "Regular budget expenditures shall be borne by the Members, as apportioned in accordance with a scale of assessment established by the Conference

> by a two-thirds majority of the Members present and voting, upon the recommendation of the Board adopted by a two-thirds majority of the members present and voting, on the basis of a draft prepared by the Programme and Budget Committee."

Article 6.3 of the UNIDO Constitution provides:

> "The contributions to be paid by the withdrawing Member for the fiscal year following that during which such instrument was deposited shall be the same as the assessed contributions for the fiscal year during which such deposit was effected. The withdrawing Member shall in addition fulfil any unconditional pledges it made prior to such deposit."

At the time of its withdrawal from UNIDO, the United States owed $61.3 million, which remains unpaid. Therefore the following question could be put to the Court: *In circumstances in which a former Member State is in default of its financial obligations to an international organization or agency, what are the rights and legal remedies available to that entity?*

B. Arbitration

18. A second legal option is submission of the matter to an arbitral tribunal. Article 22 of the UNIDO Constitution requires that disputes be referred to the Board unless the parties concerned otherwise agree to another mode of settlement. Under Article 22.1 (b), where a dispute is not settled to the satisfaction of any party to the dispute, that party may refer the matter, if the parties so agree, to an arbitral tribunal. Each party must agree that contingencies warrant arbitration, that there is an agreement to arbitrate and an existing dispute.

19. It might be argued that there is no cognizable dispute at present, as the Department of State has indicated that "... the United States recognizes its responsibilities to UNIDO with respect to payment of its arrears ...".[1] This recognition of responsibilities and assurances to secure Congressional approval of payment to UNIDO may cast doubt on the existence of a dispute. But once the legislation pending before the United States Congress becomes law, a different situation might obtain. At this point it might be objectively concluded that a dispute exists.

20. An important consideration would be to obtain the agreement of the United States Government to submit to arbitration. As the United States Government is no longer a member of UNIDO, the prospects of submitting to arbitration appear dim. However, if the executive branch as indicated by the State Department genuinely favours payment of arrears, the Government may still accept to submit to arbitration. This option could therefore be considered as a component of political negotiations to be undertaken on behalf of UNIDO by the Contact Group of Member States.

C. Suit in a United States judicial forum

21. A final legal option is a suit against the United States Government in a United States judicial forum. Suit may be initiated in a federal district court on a treaty obligation basis, or in the Federal Court of Claims on a contractual debt basis. Litigation must not be viewed as an end in itself, but as a tool for achieving the collection of arrears. A satisfactory result could be achieved in a negotiated settlement owing to the litigation process in whole or in part. Or it may be necessary to pursue litigation through to the actual judgement of a court.

22. UNIDO clearly possesses legal capacity to institute proceedings in the United States courts. However, there could be some difficulties with this option ranging from the issue of jurisdiction to the constitutional structure of the American Government. The threshold for the maintenance of suit against the United States Government is the doctrine of sovereign immunity. The doctrine is jurisdictional, and can serve as a complete bar to a lawsuit.

23. Another "jurisdictional" difficulty to be surmounted is the political question doctrine, by which courts abstain from hearing certain categories of cases. Such categories can include those touching on United States foreign relations: (a) where the court finds the existence of a political question, and (b) where the United States might suffer embarrassment in the conduct of its foreign relations. A further issue in the substance of the suit could involve the "supremacy clause" of the United Sates Constitution. "It is settled [United States] constitutional doctrine that Congress may nullify, in whole or in part, a treaty commitment".[2] The court could conclude on a treaty obligation analysis that the last act of Congress governs. Finally, it should be pointed out that this option would be the most expensive in terms of the costs associated with such a suit (see annex).

24. Despite the foregoing obstacles, Member States may wish to retain this option as a measure of last resort, to be used upon recommendation by the Contact Group.

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[1] See letter from the Assistant Secretary of State for International Organization Affairs to the Director-General of UNIDO, 31 March 1997 (document IDB.18/11).

[2] *Diggs v. Shultz*, 470 F. 2d 461, 465 (D.C. Cir. 1972).

III. CONCLUSION

25. The UNIDO Secretariat has already undertaken a number of initiatives as well as contacts with the United States authorities in order to secure the payment of the arrears owed by the United States Government. These contacts and initiatives will be pursued in particular with regard to the need to inform public opinion in the United States, through NGOs and industry groups, about the non-fulfilment of the United States obligations *vis-à-vis* UNIDO. However, the options presented in the present document imply a more direct involvement by the Member States of UNIDO as well as by the policy-making organs of the Organization in renewed efforts to ensure that the United States Government meets its payment obligations without delay. Thus, action by the Board and/or the Conference would be required to render operational the political and legal options described above.

IV. ACTION REQUIRED OF THE BOARD

26. The Board may wish to consider recommending to the Conference:

(a) The establishment of a Contact Group of Member States to engage in discussions and negotiations with the United States Government aimed at ensuring the payment of its arrears to UNIDO;

(b) To authorize the Contact Group to negotiate, if necessary, a debt settlement package with the United States Government; and to try to obtain, failing agreement on the above, the consent of the United States Government to submit the entire matter to arbitration;

(c) To request, at the same time, the International Court of Justice to give an advisory opinion on the rights of UNIDO and the legal remedies available to it in view of the continued non-fulfilment by the United States Government of its financial obligations towards the Organization, subsequent to its withdrawal from UNIDO;

(d) To authorize the Board to determine the manner in which eventual payments by the United States should be utilized, should such payments be received by the Organization between sessions of the Conference.

27. The Board may also wish to request the Director-General to pursue his contacts with non-governmental organizations and industry groups in the United States in order to provide full information to the public and enlist their support in connection with the non-fulfilment by the United States Government of its treaty obligations towards the Organization.

Annex

ESTIMATED COST AND DURATION OF OPTIONS

A. International Court of Justice advisory opinion

Duration from submission of request: approximately one year
Cost: $40,000 - $50,000

B. International arbitration

Duration: Between six months and one year
Cost: $200,000 - $400,000. Fee can be capped based on arrangement with counsel.

C. Litigation in a United States court

Duration: One to two years
Cost: If carried to judgement: $800,000. Cost would be lower if dismissed for jurisdiction, settled pre-trial, or settled during trial phases. Fee can be capped based on arrangement with counsel.

D. Debt settlement: Estimated cost of expert advice

Phase I: Settlement design: $10,000 flat fee plus out-of pocket expenses.
Phase II: Negotiations: Hourly billing at approximately $300 per hour.